

The Honorable Benjamin Settle
Trial Date: April 16, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER, MATTHEW RAY
SPENCER, and KATHRYN E. TETZ,

Plaintiffs,

vs.

FORMER DEPUTY PROSECUTING
ATTORNEY FOR CLARK COUNTY JAMES
M. PETERS, DETECTIVE SHARON
KRAUSE, SERGEANT MICHAEL
DAVIDSON, CLARK COUNTY
PROSECUTOR'S OFFICE, CLARK
COUNTY SHERIFF'S OFFICE, THE
COUNTY OF CLARK, SHIRLEY SPENCER
and JOHN DOES ONE THROUGH TEN,

Defendants.

No. C11-5424BHS

DEFENDANT SHIRLEY SPENCER'S
REPLY TO PLAINTIFFS' REQUEST FOR A
CONTINUANCE UNDER FED. R. CIV.
56(d) BEFORE RESPONDING TO
DEFENDANT MICHAEL DAVIDSON AND
SHIRLEY SPENCER'S MOTION FOR
SUMMARY JUDGMENT

RELIEF SOUGHT

Defendant Shirley Spencer respectfully requests that the Court deny Plaintiffs' Request for a FRCP 56(d) Continuance before responding to Defendant Davidson's Motion for Summary Judgment, which Defendant Spencer has joined. Plaintiffs have failed to cite

DEFENDANT SHIRLEY SPENCER'S REPLY
TO PLAINTIFFS' REQUEST FOR A
CONTINUANCE UNDER FED. R. CIV. 56(d)
(Cause No. C11-5424BHS) – 1
gw/GW1218.466/981657

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any facts to be obtained through discovery concerning Defendant Spencer and therefore have not met their burden of establishing that a continuance is warranted. Further, Defendant Spencer's statute of limitations defense against all state law claims is valid regardless of any pending discovery.

1. *Plaintiffs Have Not Met Their Burden Under FRCP 56(d)*

A party requesting a continuance of a summary judgment motion must present specified reasons why it "cannot present facts essential to justify its opposition." FRCP 56(d) (2012). In doing so, the party must make three specific showings: (1) the specific facts it hopes to elicit from further discovery; (2) that the facts sought exist, and (3) that the sought-after facts are essential to oppose summary judgment. *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

While Plaintiffs have set forth the facts that they hope to elicit from further discovery, not a single one of those facts, even if proven, would create possible liability for Defendant Spencer. Additionally, none of the facts that Plaintiffs seek involve any act or omission by Defendant Spencer. Rather, the facts that Plaintiffs seek concern the investigation, arrest and prosecution of Plaintiff Clyde Spencer. Defendant Spencer was never a member of the police force or the prosecutor's office and had no involvement in the investigation of allegations against Plaintiff Clyde Spencer, the decision to charge him, or the subsequent prosecution. As such, Plaintiffs have failed to show that further discovery is warranted in order to rule on Defendant Spencer's Motion for Summary Judgment.

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2. Plaintiff Clyde Spencer's Claim Against Defendant Spencer for Intentional Infliction of Emotional Distress is Barred by the Statute of Limitations

As an affirmative defense, the defendant has the burden of proving the applicability of the statute of limitations and the plaintiff has the burden of rebuttal. Here, Plaintiffs have failed to rebut Defendant Spencer's argument that Plaintiff Clyde Spencer's claim for intentional infliction of emotional distress is barred by the statute of limitations.

Plaintiff Clyde Spencer's claim against Defendant Spencer for intentional infliction of emotional distress is barred by the three-year statute of limitations. In Washington, causes of action arising out of an arrest or conviction must be commenced within three years of the conviction, even if it is yet to be invalidated. *Doggett v. Perez*, 348 F.Supp.2d 1169, 1175 (E.D. Wash. 2004); *Gausvik v. Abbey*, 126 Wn. App. 868, 879-82, 107 P.3d 98. As such, the statute of limitations for Mr. Spencer's outrage claim ran in 1988, three years after he was sentenced to life in prison.

The case Plaintiffs cite in their opposition is not controlling. In *Spring v. Brown*, the defendant police officers participated in the investigation and arrest of Plaintiff Spring. *Spring v. Brown*, CV-05-3047-FVS, 2007 WL 26766 (E.D. Wash. Jan. 3, 2007). Evidence collected by the officers was essential to the prosecution and subsequent trial of plaintiff. *Id.* After a jury found him "not guilty," plaintiff filed a claim against the officers for emotional distress that he suffered as a result of the "process that he was forced to undergo." *Id.* The Court inferred that plaintiff's claim was therefore based on defendants' actions up to the point of acquittal and determined that the factual basis for his claim did not exist until that point. *Id.* Because an outrage claim accrues only when a plaintiff knows or has reason to know the

1 factual basis for each element of his claim, the Court determined that statute of limitations did
2 not begin to run for plaintiff until his acquittal. *Id.*

3 The basis of Plaintiff Spencer's claim against Defendant Spencer is the allegation
4 that she was involved in a romantic relationship with Detective Davidson while Plaintiff
5 Spencer was being investigated. As proven by the history of proceedings leading to this suit,
6 Plaintiff Spencer has known of the basis for his claims against Defendant Spencer since *at*
7 *least* 1986, when he appealed his conviction *upon the same basis*. Dkt. 62, p. 7:10-13.
8 Specifically, in his 1986 appeal, Plaintiff Spencer alleged that he was unconstitutionally
9 coerced into his *Alford* plea as a result of Sergeant Davidson's alleged romantic involvement
10 with Defendant Spencer. *Id.* Under *Spring*, the statute of limitations for Plaintiff's claims
11 therefore would have accrued in 1986. As such, even if the analysis of the case that Plaintiffs
12 cite is applied, the claim should be dismissed as untimely.

13 Additionally, unlike the defendants in *Spring*, Defendant Spencer was *not* involved in
14 the investigation, arrest, prosecution or sentencing of Mr. Spencer. Rather, her involvement
15 began and ended between 1984 and 1985. Defendant Spencer's limited involvement, both in
16 time and in scope, therefore does not compel the result in *Spring*. In *Spring*, defendants were
17 directly involved in all stages of plaintiff's criminal proceedings and the court determined that
18 the factual basis for plaintiff's claims may not have been apparent to him until the
19 proceedings concluded. The factual basis for Plaintiff Spencer's claims against Defendant
20 Spencer has been apparent for over 20 years. Accordingly, the statute of limitations has run.

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3 **3. *Plaintiff Clyde Spencer's Claim Against Defendant Spencer for Conspiracy is Barred by the Statute of Limitations***

4 As stated above, causes of action arising out of a conviction must be commenced
5 within three years of the conviction. *Doggett, supra*. Accordingly, the three-year statute of
6 limitations for Plaintiff's state law conspiracy claim against Defendant Spencer accrued when
7 he was sentenced to prison in May, 1985, and ran three years later, in May 1988.

8 Plaintiffs assert that Plaintiff Spencer's state law cause of action for conspiracy is
9 timely because "the deprivation of his constitutional rights continued through his *Alford* plea,
10 and until the proceedings terminated in his favor." Dkt. 76, p. 12:21-23. Contrary to plaintiff's
11 argument, the statute of limitations is not tolled until the point at which the plaintiff is no
12 longer experiencing damages. If that were the case, personal injury claimants with life-long
13 injuries would be able to assert claims into perpetuity and the statutes setting forth the time
14 limitations on claims would be moot.

15 As Plaintiff Spencer's state law conspiracy claim against Defendant Spencer was
16 asserted more than two decades after the statute of limitations ran, it is not timely and should
17 be dismissed with prejudice.

18 **CONCLUSION**

19 Based upon the foregoing, the Court should deny Plaintiffs' request for a continuance
20 before responding to Defendant Spencer's pending summary judgment motion. Plaintiffs have
21 presented no facts that they hope to establish through additional discovery which would create
22 liability for Defendant Spencer and have similarly failed to rebut Defendant Spencer's statute
23 of limitations defense to the state law claims.

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2 DATED this 22nd day of June, 2012.

3 By: s/ Gary A. Western

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

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SIGNED this 22nd day of June, 2012, at Seattle, Washington.

s/ Betty Dobbins
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